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IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. 721

SOUTHERN KANSAS GREYHOUND LINES, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

Appeal from the United States District Court for the Western District of Missouri, Western Division

STATEMENT AS TO JURISDICTION

JACK R. TURNEY, JR.,
Attorney for Appellant.

Dated February 29, 1956.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT AS TO JURISDICTION

Southern Kansas Greyhound Lines, Inc., appellant, presents this its statement as to the jurisdiction of the Supreme Court of the United States to review the judgment of the United States District Court for the Western District of Missouri, Western Division.

OPINION BELOW

The opinion of the District Court is reported in 134 F. Supp. 502. A copy is appended as Appendix A.

JURISDICTION

The suit below was brought by appellant, under Title 49 U. S. C. Secs. 305(g) and (h) and Title 28 U. S. C. Secs. 1336, 1398, 2284, 2321-2325, and Title 5 U. S. C. Sec. 1009, to set aside an order of the Interstate Commerce Commission (R. Vol I, page 7), entered November 23, 1954, granting a certificate of convenience and necessity to Kansas Trails, Inc. to extend its motor bus operations and an order of the Commission, entered March 21, 1955 denying the petition of the present appellant and others for reconsideration (R. Vol I, page 21).

The judgment of the District Court, dismissing the complaint, was entered October 3, 1955. The notice of appeal was filed December 1, 1955. By order entered January 27, 1956, the District Court extended the time for docketing the case, filing the record on appeal, and filing the jurisdictional statement to and including February 29, 1956.

Jurisdiction to review the decision of the District Court on direct appeal rests on Title 28 U. S. C. Secs. 1253 and 2101(b).

QUESTIONS PRESENTED

1. The first question is whether the Court below erred in holding, contrary to the holdings in other Federal District Courts that, in ganting a certificate of public convenience and necessity under the Interstate Commerce Act, authorizing operations duplicating and

paralleling those of protesting motor carriers of passengers, which already are operating at deficits, the Interstate Commerce Commission may, after due request, lawfully fail or refuse to make an express finding or its equivalent as to whether the proposed operation will unduly impair existing service.

2. The report of the Commission failed to state or indicate in its report whether it had actually considered and weighed or was even aware of the undisputed evidence that there is not sufficient traffic available to support the existing service between the points involved, much less the proposed additional duplicative service, and that the proposed operation would seriously impair appellant's service. The second question is whether the Court below erred in holding, contrary to holdings in other Federal District Courts, that it must be presumed, from the ultimate statutory finding, that the Commission considered that evidence and determined that issue.

3. The evidence is undisputed that the authorized Kansas City-Tulsa operation would serve primarily points already served by appellant in its Kansas City-Tulsa service, including all of the principal traffic points; that the applicant before the Commission proposes to add an additional amount of service equal to 40% of the service now rendered by appellant between those points; that traffic between the common points has declined drastically in recent years and at the time of the hearing was less than 50% of what it had been six years before; that appellant's operations between the common points, which constitute virtually its entire operation, had operated at a deficit for a year or more prior to the hearing; that appellant had been forced by declining traffic to reduce service along the

routes and between the points involved and that any further diversion or loss of traffic by appellant would necessitate further impairment of its service; that a substantial diversion of appellant's traffic between the common points would be inevitable from the institution of the proposed duplicative operation, and that, according to official records required by law to be maintained, the buses of appellant had been operated between the common points at averages of less than 40% of capacity during the year preceding the hearing.

The third question is whether, in the light of the record as a whole, including these undisputed facts, the District Court erred in holding that testimony of occasional crowding on buses leaving a single point, more than a year prior to the hearing, plus testimony speculating that the proposed operation would attract an unspecified amount of additional traffic, constitutes sufficiently substantial evidence that there would be no impairment of existing service to sustain an order of the Commission authorizing an additional and competitive operation between the points served by appellant.

4. The fourth question is whether the District Court erred in holding that there were sufficiently substantial evidence, adequate findings, and ample jurisdiction for the Commission to grant authority, under Title 49, Sec. 307(a), for Kansas Trails to carry passengers traveling from Kansas City to Tulsa, or from Tulsa to Kansas City, where there was (a) no evidence of need for additional service for such passengers and (b) no finding that the public convenience and necessity require additional service for such passengers.

STATUTES INVOLVED

The principal statute involved is Section 207(a) of the Interstate Commerce Act (Title 49 USC Sec. 307(a)), the pertinent portion of which provides:

> "* * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *"

The second statute involved is Section 10(e) of the Administrative Procedure Act (Title 5 USC Sec. 1009(e)), which provides:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case

subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

STATEMENT OF THE CASE

The case below arose out of an application before the Interstate Commerce Commission by Kansas Trails, Inc., which operates, among other places, between Kansas City, Missouri and Osawatomie, Kansas, to extend its operations an additional 202 miles from Osawatomie into Tulsa, Oklahoma, in order that it might provide through-bus operation between Kansas City and Tulsa, serving intermediate points. Of the 202 miles, 180 miles, *i.e.*, from Garnett to Tulsa duplicates the routes of existing carriers, which protested the application. The Garnett-Coffeyville segment (96 miles) duplicates the route used by appellant in its Kansas City-Tulsa operations. The Coffeyville-Tulsa segment (76 miles) parallels appellant's Kansas City-Tulsa operations via Coffeyville and duplicates the Coffeyville-Tulsa route of the other plaintiff below, Missouri Kansas and Oklahoma Coach Lines, Inc.

Based upon public testimony to the effect that from certain intermediate points the existing *two-line* services were inconvenient, the Commission found a need for *single-line* service between points on Kansas Trails'

present and proposed routes which do not now have such service.

Appellant provides *single-line* service between Kansas City and Tulsa via a route which the proposed route duplicates in part and parallels in part, serving all important intermediate cities. The evidence was undisputed that the existing service for passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City is adequate, and the Commission made no finding of inadequacy of service for such passengers.

The evidence was undisputed that traffic on appellant's Kansas City-Tulsa service had been rapidly declining for some years, that appellant had been forced to reduce its service because of inadequacy of traffic, that its entire operation had been conducted at a deficit for the year preceding the hearing, and that the portion between Garnett and Tulsa had been operated at a deficit for the two years prior to the hearing.[1]

The protestants, including appellant urged the Commission to weigh and consider the extensive undisputed evidence showing that the proposed operation, which was designed primarily for the Kansas City-Tulsa traffic, could not fail to impair the existing service between those cities which it would duplicate and

[1] The Court below erroneously concluded that the unsupported observation of one witness that at times, more than a year prior to the hearing, he had observed crowded conditions on several of appellant's buses leaving a single intermediate point, together with the speculation of other witnesses that new traffic would be developed from the new points to be served, constituted substantial evidence to rebut the statistical records which appellant is required by law to maintain. The invalidity of that conclusion is discussed hereinafter.

parallel, particularly the deficit service of appellant. They requested the Commission to find that it would impair that service, and, in accordance with the uniform holdings in many other cases to the effect that non-impairment of existing service is an essential prerequisite to a finding of public convenience and necessity, to deny the application.

The report of the Commission mentions the contention that the proposed operation would result in impairment of existing service (R. Vol. I, Page 16) but neither makes a finding thereon, mentions the evidence relating to that contention, nor otherwise indicates that it weighed, considered, or determined that question.

Appellant and Missouri Kansas & Oklahoma Coach Lines, Inc. brought the action below on the grounds, so far as are pertinent here, that the Commission's order was invalid in that it (a) failed to contain a finding with respect to the crucial and basic question whether existing service would be impaired, (b) failed to indicate that the Commission had actually considered and weighed or was even aware of the undisputed evidence tending to show that impairment would necessarily result, (c) was not supported by substantial evidence to show that such impairment would not result, and (d) violated the express limitations of Title 49, Sec. 307(a) in granting authority to provide service in excess of the service with respect to which there was evidence of public convenience and necessity.

The Court below dismissed the complaint, holding, among other things, that: (a) the Commission need not make a finding with respect to impairment of existing service, but need only make the ultimate statu-

tory finding, (b) the Commission need not indicate affirmatively that it had considered or determined the question of impairment, since the Court was bound to assume that it had weighed and considered it, (c) there was substantial evidence of non-impairment, conclusive upon the Court, and (d) the evidence and finding of need for single-line service to and from intermediate points were sufficient to validate the order permitting service for passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City.

QUESTIONS SUBSTANTIAL

One of the most important sections of the Interstate Commerce Act is Title 49 U. S. C. Sec. 307(a), which gives the Interstate Commerce Commission jurisdiction to issue certificates of convenience and necessity authorizing new motor carrier operations. The Commission and the Courts have held uniformly that an essential issue and element in the definition of public convenience and necessity is that the new proposed service can be operated without endangering or impairing the operations of existing carriers.

In the United States District Court for the District of Columbia,[1] in the United States District Court for New Jersey,[2] and in the United States District Court for the Eastern District of Missouri,[3] the law is that it is essential to the granting of such authority that

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[1] See *Clarke* vs. *United States*, U. S. D. C. D. C. (1951) 101 F. Supp. 587.

[2] *Hudson Transit Lines* v. *United States*, U. S. D. C. N. J. (1948) 82 F. Supp. 153, affirmed (1949) 338 U. S. 802.

[3] *L. A. Tucker Truck Lines* v. *United States* (1953), U. S. D. C. E. D. Mo., 115 F. Supp. 647.

there be both substantial evidence and *an express finding* that a proposed authorized route will not impair existing service.

In the cause below, the United States District Court for the Western District of Missouri has held directly to the contrary. On a matter of such nationwide importance as the conditions precedent to the issuance of a certificate of public convenience and necessity under the Interstate Commerce Act, there should be absolute uniformity among the various Federal Courts. This can only be achieved by an express determination on the issue by this Court, preferably following plenary consideration, including briefs on the merits and oral argument.

Secondly, the Court below, although apparently conceding that decisions of this Court clearly establish that the Commission must weigh and consider the disadvantage to the public of an undue impairment of the service of existing carriers, construes language of this Court in other decisions as requiring reviewing Courts to *presume* from the ultimate statutory finding that the Commission weighed and considered evidence relating to that issue, even in the absence of an indication by the agency that it did so. If this ruling be correct, judicial review of agency action becomes a mere formality, agencies are free to make arbitrary determinations without regard to the really crucial issues, and to base their decisions on one-sided and relatively insignificant sub-issues, and the Courts are powerless to do anything about it. Affirmation by this Court would aggravate the destructive effect of the opinion below upon the law pertaining to judicial review, because that decision is based upon interpretation of language of this Court.

ARGUMENT

The District Court Erred in Holding That No Finding Upon the Question of Impairment of Existing Service Was Necessary

Title 49 U. S. C. Sec. 307(a) lists only the *ultimate* findings which must be made in order to give the Commission the jurisdiction to issue a certificate. One of these is that the "public convenience and necessity" require the operations authorized, and the other that the applicant is fit, willing and able to perform them.

The *definition* of "public convenience and necessity," uniformly accepted by the Commission and the Courts, includes the requirement that the proposed new operation or service can be conducted "without endangering or impairing the operations of existing carriers contrary to the public interest."

> *Interstate Commerce Commission* v. *Parker* (1944), 326 U. S. 60, 72 (Footnote 7);
>
> See also *American Trucking Associations, Inc.* v. *United States* (1944), 326 U. S. 77, 86.

The District Court concedes, in deference to the latter cases, that the Interstate Commerce Commission must, in determining applications under Section 307(a), consider and weigh the disadvantage to the public of undue impairment of existing service, but holds that no finding upon these matters is necessary.

The Court draws too fine a line. In the first place, it overlooks the fact that this Court, in the *Parker* case expressly declared (at pages 69-70):

> "*Since,* however, on adequate evidence the Commission *found* that the motor service sought was of a different character from the existing motor service and not directly competitive *or unduly*

prejudicial to the already certificated motor carriers, 42 M. C. C. (F) 725, 726, *we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue."* (Emphasis supplied.)

Second, the primary objective of the instant application was for authority to compete for precisely the same traffic as that carried by existing carriers, which already were operating at deficits and had been forced to reduce service as a result of an insufficient volume of traffic. There was never even any attempt to rebut or refute the evidence showing that there would be diversion and that the existing service would be impaired. Under such circumstances, the competitive effect of the proposed operation was the most important and basic issue, the determination of which was a prerequisite to a finding of public convenience and necessity. Since there was not enough available traffic to support the proposed new service in addition to the existing service, authorization of another carrier clearly would be contrary to the public interest.

> *Texas and Pacific Railway Co.* vs. *Gulf, Colorado & Santa Fe Railway Co.* (1926), 270 U. S. 266, 277.

Since the question of impairment is a basic issue, its determination must be clearly ascertainable from express findings or their equivalent, and cannot be supplied by inference or implication from the statutory conclusions.

> *Atchison, Topeka & Santa Fe Railroad Company* v. *United States* (1934), 295 U. S. 193;
>
> *Florida* v. *United States* (1930), 282 U. S. 194;

United States v. *Pierce Auto Freight Lines* (1945), 327 U. S. 515, 533.

For the foregoing reasons, among others, the District Courts for the District of Columbia,[1] New Jersey,[2] and the Eastern District of Missouri[3] each reversed grants of authority by the Commission upon the ground that it had failed to make an express finding of fact on the basic issue of impairment of service.

The Court below bases its conclusion to the contrary chiefly upon a construction of *United States* v. *Pierce Auto Freight Lines, supra,* as holding that the Commission need only make the *ultimate* findings of public convenience and necessity and fitness, named in the statute, and that the Court must assume that the Commission considered and determined all of the necessary subordinate questions. That interpretation is erroneous. In the first place, the opinion of this Court in the *Pierce* case, at page 533, expressly declared that a finding in the statutory language would *not* be sufficient in the case of the *other* required ultimate finding,—*viz.*, the fitness of the applicant.

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[1] *Clarke* vs. *United States* (1951), U. S. D. C. 101 F. Supp. 587.

[2] *Hudson Transit Lines* vs. *United States* (1948), U. S. D. C. N. J. 82 F. Supp. 153, 157, affirmed 338 U. S. 802. The District Court in the present case misconstrues the cited decision, apparently overlooking the following language: "The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service *without being unduly prejudicial to the existing service. Interstate Commerce Commission* vs. *Parker, supra. No such finding has here been made,* nor is there any evidence to support a finding." (Emphasis supplied.)

[3] *L. A. Tucker Truck Lines* v. *United States* (1953), U. S. D. C. Ed. Mo., 115 F. Supp. 647, 649, quoting verbatim the finding in the *Hudson Transit* case, quoted in the preceding footnote.

In the second place, the construction overlooks the fact that the issue before the Supreme Court in the *Pierce* case was not whether the Commission had failed to make clear its determination of the competitive effect of *either* of the two applications before it, but whether it had made clear its determination of the competitive effect of *both* of the approved applications. In that case, the Commission had held expressly that one of the issues was whether the new service could be conducted "without endangering or impairing the operations of existing carriers contrary to the public interest", and had discussed at length the evidence showing that the two applicants already transported the bulk of the traffic involved, that the traffic in the area was steadily increasing, that for a large amount of the traffic there was no carrier service available, that the lone authorized competitive carrier had not instituted daily service until after the filing of the applications, and that in general the service of the protesting carriers between the points involved was negligible. Read in its proper context, the decision in the *Pierce* case does not determine the point here in issue, but holds that where the Commission clearly determined, as it there did, the competitive effect of each of the two applications, that determination necessarily and inescapably included the determination of the competitive effect of both applications.

In the instant case there is no indication that the Commission made any determination as to the competitive effect of the operation which it authorized, despite its substantial duplication of existing services which were already on the brink of impairment for lack of traffic.

The second case relied upon in the Court below is *Alabama Great Southern R. Co.* v. *United States*

(1950), 340 U. S. 216. The very portion of that decision quoted in the opinion below expressly declares that the Commission is not relieved of the duty to make the basic findings of fact, and that what constitute basic findings varies with the context of the situation presented. The Court also expressly found that the Commission had adjudged (a) that the authorized differentials in that case would be compensatory, (b) that competition between rail-barge service and all-rail service was worth preserving, (c) that such competition would not be preserved unless the differentials were prescribed and the losses of traffic curtailed, and (d) other factors. Those findings, supporting the ultimate statutory findings, were deemed by the Court to be adequate. That decision merely stands for the proposition that differentials between all rail rates and rail-barge rates may be based upon factors other than differences in costs. It has no bearing upon the issue here, which is whether the Commission and Courts have been correct in their many declarations that non-impairment of existing service is a necessary basic issue in determining public convenience and necessity for the authorization of operations duplicating existing operations which are unable to withstand any of the inevitable diversion of traffic.

The District Court Erred in Holding That the Reviewing Court Must Presume That the Commission Considered and Weighed the Evidence Relating to the Issue of Existing Service Despite the Absence of Any Indication That It Did So.

The report of the Commission, although mentioning that appellant and others opposed the application on the ground that it would impair existing service, makes no mention of the evidence relating to that issue, nor indicates in any way that it had considered it or deter-

mined it. Its entire discussion of the evidence and the issues was confined to other matters.

Having conceded, following the *American Trucking Associations, Inc.* and *Parker* cases, *supra,* that impairment of existing service is an essential issue which must be weighed and considered, the decision of the District Court nullifies that principle by holding that "the Commission could not have been oblivious to the competitive consequences of its order upon the plaintiffs or upon the public interest". The effect of that ruling is to eliminate from the decisions of this Court in the *American Trucking* and *Parker* cases, the requirement that the Commission *"consider* and *weigh"* the issue of impairment, and to confine those decisions to the requirement of *"hearing"* evidence upon that issue.

Again the Court below bases this ruling upon the *Pierce Auto Freight Lines* case, *supra.* As mentioned before, the Commission's report in that case discussed at length and indicated beyond question its determination that neither of the authorities granted would unduly impair existing service, and the Supreme Court itself ruled that in making these separately stated determinations the Commission clearly had not been oblivious of the competitive consequences, which it had discussed at length. Under such circumstances the Court quite properly refused to sustain a technical presumption that the Commission had not considered the issue. That is a far cry from ruling, as did the Court below here, that the Commission need not give any indication in its report of awareness of, or consideration or weighing of the evidence relating to the competitive effect.

The purpose of judicial review, in the final analysis, is to insure that the Commission weigh and consider and act upon the evidence relating to the basic issues which must determine the ultimate findings. Where, as here, the Commission gives no indication of having "weighed and considered," much less of having made a determination upon, the basic issue of impairment of existing service, the Court has no way of knowing whether the Commission actually weighed that evidence. To rule, as did the Court below, that the Commission's report need not show on its face that such issues were considered and determined, is, as a practical matter, to render judicial review a nullity, and to reduce the function of the reviewing court to merely giving rubber-stamp approval, based upon conclusive presumption that the Commission had fulfilled the requirement.

The District Court Erred in Holding That There Was Substantial Evidence That Impairment of Existing Service Would Not Result from the Authority Granted

In determining whether substantial evidence exists in the record, a reviewing court must review the whole record and take into account whatever in the record fairly detracts from the weight of the evidence.

> *Administrative Procedure Act,* Sec. 10(e), Title 5, U. S. C. Sec. 1009 (e);
>
> *Universal Camera Corporation* v. *National Labor Relations Board* (1951), 340 U. S. 474.

The evidence in this case is undisputed that:

1. Kansas Trails proposes to operate through-bus Kansas City-Tulsa service, serving the following points *which are also served by appellant in its Kansas City-*

Tulsa operations: Kansas City, Garnett, Welda, Colony, Iola, Humboldt, Chanute, Earlton, Thayer, Morehead, Cherryvale, Coffeyville, Collinsville and Tulsa; it proposes an additional amount of service equal to 40% of the service now rendered by appellant between those points;

2. The Kansas Trails' service also will include service to the following points which are now served by Missouri, Kansas & Oklahoma Coach Lines in conjunction with a portion of appellant's service between Kansas City and Tulsa: South Coffeyville, Lenapah, Delaware, Nowata, Watova, Talala, Oolagah, and Owasso;

3. The only proposed new points not served by appellant, either directly or in conjunction with Missouri, Kansas & Oklahoma Coach Lines, are the relatively small points of Olathe, Springhill, Hillsdale, Paola, Osawatomie, and Greeley, Kansas;

4. Traffic between the points where Kansas Trails proposes a new additional competition has declined steadily for some years, and at the time of the hearing was less than 50% of what it had been six years before;

5. Appellant's operations between the involved points, which constitute virtually its entire operation, had operated at a deficit for a year or more prior to the hearing, according to official records and reports required by law to be maintained;

6. According to official records, required by law to be maintained, the buses of both appellant and Missouri, Kansas & Oklahoma Coach Lines had operated over the routes and between the points involved at *averages* of less than 40% of capacity during the year preceding the hearing;

7. Both appellant and Missouri, Kansas & Oklahoma Coach Lines had been forced by declining traffic to reduce service along the routes and between the points involved;

8. Any further diversion or loss of traffic by appellant would necessitate further impairment of its service;

9. A substantial diversion of appellant's traffic between the common points would be inevitable from the institution of the proposed duplicative operation.

In the face of the foregoing evidence, the Court below held that testimony of a passenger-witness that on isolated trips taken by him, more than a year prior to the hearing, between Coffeyville and Tulsa, appellant's buses were crowded, plus unsupported opinions or guesses that the proposed new operation would create an unspecified amount of additional traffic, constituted substantial evidence that the proposed operation would not produce such diversion of traffic as would impair the existing service, and was conclusive upon the Court. Appellant submits that that ruling renders the requirement of *substantial* evidence a nullity and constitutes precisely the type of ruling condemned by this Court in the *Universal Camera* case, *supra.*

The District Court Erred in Holding That There Were Substantial Evidence and Adequate Finding to Authorize Service for Tulsa-Kansas City Passengers

Title 49 U. S. C. Sec. 307(a) expressly limits the Commission's jurisdiction to granting certificates to *"the extent"* to which the proposed service is required by the public convenience and necessity.

The principal purpose of the application before the Commission was to provide through-bus service be-

tween Kansas City and Tulsa, and the Commission so found. The evidence was undisputed that passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City would be the principal traffic affected. The evidence was likewise undisputed that existing service for such passengers was entirely adequate and there was no criticism whatsoever of that service. The evidence was undisputed that appellant provides single-line through-bus service between those two cities, the adequacy of which was never questioned. The Commission's report itself expressly limited its finding of need to points between which single-line service was not available. In short, there was neither evidence nor finding that the public convenience and necessity require the authorized service for Kansas City-Tulsa passengers.

In the premises, the Commission had no jurisdiction under Section 307(a) to authorize service for passengers traveling from Kansas City to Tulsa or from Tulsa to Kansas City, and the Court below erred in holding that there were adequate findings and substantial evidence to support the grant of authority to provide service for such passengers.

CONCLUSION

Under the principles announced in the District Court, judicial review becomes an impotent mechanical process, in which the Court merely looks to see whether the agency has made the *ultimate* findings of fact required by the statute, and if so, is powerless to proceed further. Although the District Court appears to concede that the issue of impairment of existing service is a basic issue which must be "weighed and considered" by the Commission, in determining whether

public convenience and necessity require a proposed operation, and that a proposed operation which would unduly impair existing service cannot be approved by the Commission, it nullifies both of those requirements by holding that the agency need not either (a) make a finding upon those basic issues, or (b) indicate that it was aware of the evidence relating to, had weighed and considered the evidence relating to, or had determined those issues. According to its ruling, once the Commission makes the ultimate finding of fact specified in the statute, the Court is bound to presume, that the Commission weighed, considered and determined the basic issues, even though the report of the Commission does not indicate that it did so.

The District Court reached this result through what is believed to be misapplication of pronouncements of this Court, particularly those appearing in the *Pierce Auto* case. The latter case is clearly distinguishable from the present case, in that it involved a Commission report which showed on its face that it had carefully weighed and considered this precise basic issue, and had declared, in connection with the *other* ultimate finding required by the same statutory section, that the *ultimate* finding, without findings upon the underlying basic issues, is *not* sufficient.

The decision of the District Court admittedly is contrary to the decision of at least one other District Court upon the identical question relating to the same statutory provision. Appellant believes it also to be contrary to decisions upon the same question by other District Courts. Only action by this Court can achieve nationwide uniformity in the law governing judicial review of Commission determinations under

this important section of the Interstate Commerce Act.

Of lesser national importance, but of great local importance from the standpoint of preservation of existing services between Kansas City and Tulsa, are the errors of the District Court in concluding that there was substantial evidence that the proposed operation would not unduly impair existing service and in finding that there was substantial evidence and adequate finding of a need of the proposed competitive service for passengers traveling from Kansas City to Tulsa, and from Tulsa to Kansas City.

The matters here in issue appear to be sufficiently important to warrant this Court in hearing oral argument and accepting briefs on the merits and ultimately reversing the District Court.

Respectfully submitted,

JACK R. TURNEY, JR.,
Attorney for Appellant.

Dated February 29, 1956.

Proof of Service

I, Jack R. Turney, Jr., attorney for Southern Kansas Greyhound Lines, Inc., appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of February 1956, I served copies of the foregoing Statement as to Jurisdiction on the several parties, as follows:

On the United States, by mailing a copy with postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

On the Interstate Commerce Commission by leaving a copy thereof at the offices of Robert W. Ginnane, Esquire, its General Counsel, and Isaac K. Hay, Esquire, Assistant General Counsel, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

On Kansas Trails, Inc., intervening defendant, by mailing copies in duly addressed envelopes with Air Mail postage prepaid to its attorneys of record as follows: J. William Townsend, Esquire, 204 Central Building, Topeka, Kansas; Oliver D. Rinehart, Esquire, Potts Building, Paola, Kansas; and John McCall, Esquire, Chanute, Kansas.

JACK R. TURNEY, JR.,